

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRIA LOUISE SKINNER,

Defendant-Appellant.

UNPUBLISHED

May 22, 2014

No. 313930

Kent Circuit Court

LC No. 11-005437-FH

Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was acquitted of intentional welfare fraud, MCL 400.60(1), but she was convicted of neglecting or refusing to report information concerning income, relevant circumstances, or changes in income or circumstances relative to her eligibility to receive welfare benefits, MCL 400.60(2). The prosecution's theory was that defendant's failure to comply with MCL 400.60(2) resulted in her receiving \$10,614 in welfare benefits to which she was not entitled. Defendant was sentenced to 30 months' probation and ordered to pay \$10,614 in restitution. She appeals as of right, arguing that trial counsel was ineffective for failing to call an expert witness to testify on defendant's behalf and that the prosecutor engaged in misconduct during his closing and rebuttal argument. We affirm.

The prosecution's case against defendant under MCL 400.60(2) was based on allegations that defendant did not timely report a change in her employment status, whereupon her income had increased, and failed to timely disclose the presence of a male in her household and his income. According to the prosecution, had defendant accurately and timely reported the information, she would not have been eligible for any of the welfare benefits that she received. Defendant claimed that she accurately and timely supplied the Department of Human Services (DHS) with the necessary information and that DHS errors and incompetence were to blame. Prior to trial, defense counsel consulted with an individual who was an expert on welfare-benefit analyses, calculations, and awards. The expert also sat in on part of defendant's trial; however, she was never called to the stand to testify.

On appeal, defendant argues that counsel was ineffective in not having the expert testify on defendant's behalf. The crux of defendant's argument is that the expert could have rebutted the calculations made by DHS concerning the overpayment of welfare benefits to defendant, as allegedly caused by defendant's failure to comply with MCL 400.60(2).¹ Under MCL 400.60(2), "[a]ny person who shall neglect or refuse to submit to the department issuing relief the information required by this section, if the amount of relief granted as a result of the neglect or refusal is less than \$500.00, is guilty of a misdemeanor, and if the amount of relief granted as a result of the neglect or refusal is \$500.00 or more, is guilty of a felony[.]" Defendant was convicted of the felony, and the expert was prepared to testify that defendant was only overpaid \$388, which would have reduced the crime to a misdemeanor. Defendant argues that she was therefore prejudiced by counsel's deficient performance.

We review de novo the constitutional question whether defendant was denied his Sixth Amendment right to the effective assistance of counsel; however, underlying factual findings are reviewed for clear error. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the well-established principles applicable to an ineffective assistance claim:

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test. First, the defendant must show that counsel's performance was deficient.^[2] This requires

¹ MCL 400.60(2) provides in part:

There is imposed upon every person receiving relief under this act either upon the person's own application or by the person's inclusion, to his or her knowledge, in the application of another the continuing obligation to supply to the department issuing the relief: (a) the complete circumstances in regard to the person's income from employment or from any other source or the existence of income, if known to the person, of other persons receiving relief through the same application; (b) information regarding each and every offer of employment for the person or, if known to him or her, of the other persons receiving relief through the same application; (c) information concerning changes in the person's circumstances or those of other persons receiving relief through the same application which would decrease the need for relief; and (d) the circumstances or whereabouts, known to the person, of relatives legally responsible for the person's support or for the support of other persons receiving relief through the same application if changes in those circumstances or whereabouts could affect the amount of assistance available from those relatives or affect their legal liability to furnish support.

² Establishing deficient performance requires a showing that counsel's "representation fell below an objective standard of reasonableness[.]" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and internal quotation marks omitted.]

“Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Of course, the trial strategy must be sound, and “a court cannot insulate the review of counsel’s performance by [simply] calling it trial strategy.” *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). “Initially, a court must determine whether the strategic choices were made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* (internal quotation marks, alteration, and citation omitted). “In general, the failure to call a witness can constitute ineffective assistance of counsel only when it ‘deprives the defendant of a substantial defense.’” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citation omitted). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009), quoting *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

A *Ginther*³ hearing was conducted after this Court granted defendant’s motion to remand for an evidentiary hearing. *People v Skinner*, unpublished order of the Court of Appeals, entered August 23, 2013 (Docket No. 313930). The expert’s opinion set forth in her affidavit and in her testimony at the *Ginther* hearing was premised on a document prepared by defendant herself, reflecting defendant’s calculations and version of events. The expert responded, “No, I did not,” when asked whether she verified the factual information in the document prepared by defendant. In defendant’s document relied on by the expert, the presence of defendant’s future husband in the house was apparently not taken into account. When queried whether that factor could impact DHS’s determination of eligibility for benefits if there was evidence that defendant and her future husband had more than a landlord-tenant relationship at the time, the expert stated, “It’s a possibility.”⁴ In light of the equivocal and questionable nature of the expert’s testimony and her

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁴ The calculations in defendant’s document did appear to take into consideration the change in her employment status and the resulting overpayment of benefits, where defendant’s income increased with the change. Defendant testified that she had communicated to DHS the change in her employment status and that it was DHS error that caused the overpayment of subsequent benefits.

reliance on defendant's calculations and version of events, which the jury clearly rejected, there is no sound basis for us to conclude that defendant was deprived of a substantial defense, that trial counsel's performance was deficient, or that the requisite prejudice was established. Reversal is unwarranted.

Defendant next argues on appeal that she was denied a fair trial because the prosecutor engaged in misconduct by making certain improper comments during closing and rebuttal argument. There were no objections to the challenged remarks; therefore, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant bootstraps an ineffective assistance claim on the basis of trial counsel's failure to object.

With respect to the various comments made by the prosecutor indicating or suggesting that defendant was being less than truthful, "[a] prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief[.]" *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In so doing, a prosecutor "is not required to state inferences and conclusions in the blandest possible terms." *Id.* Rather, when supported by the evidence, the prosecutor may use "hard language." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Here, the prosecutor was simply arguing, on the basis of the evidence, that defendant was not worthy of belief, using at times acceptable hard language. There was no misconduct, and counsel was not ineffective, given that any objection would have been futile. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

With respect to defendant's additional arguments alleging prosecutorial misconduct by way of the prosecutor's remarks concerning how criminal defendants generally blame everyone else, concerning the failure of defendant's mother to testify, and concerning persons who are genuinely in need of welfare benefits and truthful with DHS, assuming without deciding that the prosecutor crossed the line of propriety, defendant has simply not established prejudice, as required for the unpreserved claim of prosecutorial misconduct, *Carines*, 460 Mich at 763-764, and the claim of ineffective assistance of counsel, *Carbin*, 463 Mich at 599-600. And even if there was some initial minimal prejudice, it was alleviated by the trial court's instructions, which directed the jury to render its verdict on the basis of the evidence, not on sympathy or the statements or arguments of counsel. See *People v Unger*, 278 Mich App 210, 240-241; 749 NW2d 272 (2008); *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly